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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

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**No. 643**

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CHARLES SIMUS,

*Petitioner,*

*vs.*

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.**

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CHARLES LIEBMAN,
PEARL M. HART,
29 South LaSalle Street,
Chicago, Illinois,
*Attorneys for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Charles Simus, respectfully prays that a writ of *certiorari* issue to review a judgment of the Supreme Court of Illinois, entered June 17, 1941, dismissing a petition for writ of mandamus against the respondent in this case, by which this petitioner had sought to compel respondent to certify a report of proceedings at a trial.

The opinion of the Supreme Court of Illinois appears in full in the record (Trans. 145-147) and is reported at 377 Ill. 122, and 35 N. E. (2nd) 371. The time to file the petition for *certiorari* was extended by order of Mr. Justice Frankfurter to September 23, 1941.

## STATEMENT OF THE CASE.

Petitioner, Charles Simus, was arrested by Chicago police on August 30, 1940, and brought to trial before Judge Frank E. Donoghue of the Municipal Court of Chicago on August 31, 1940. He was charged with disorderly conduct. He had no lawyer. The proceedings which constituted his trial were as follows (Trans. 14):

> The Deputy Clerk cried, "*City of Chicago* v. *Charles Simus,*" and Charles Simus stepped to the bar.
>
> And thereupon the Judge said to the defendant: "What is your trade?"
>
> And the defendant thereupon said: "I am a baker".
>
> And the Judge thereupon said: "$50.00 and costs".
>
> And the defendant thereupon said: "But, Judge, I haven't had a chance to say anything".
>
> And the Judge thereupon said: "Do you want me to disgrace you before all these people?"
>
> Whereupon, the defendant said: "But, Judge, I was right in front of the police station".
>
> Whereupon the Judge waved to the Bailiff to take the defendant away.

A judgment for $50.00 and costs was entered against Simus, enforceable by imprisonment (Ill. Rev. Stat. 1939, Ch. 24, Par. 80), and he was kept in custody until it was paid by relatives that same day.

Subsequently petitioner made a motion for new trial, setting forth want of due process in his "trial," in violation of the Federal Constitution, which was denied (Trans.

15). He then appealed the judgment of conviction to the Illinois Supreme Court (Trans. 3).

In order to obtain a review of proceedings had at the trial, under Illinois law, appellant must prepare a report of proceedings and present it to the trial Judge for settlement and certification. Upon certification, the report of proceedings is filed in the case and becomes a part of the record. In the absence of a report of proceedings, the happenings at the trial of the case cannot be reviewed. *Boyles* v. *Chytraus,* 175 Ill. 370, 373.

Petitioner therefore prepared a report of proceedings, setting up what had happened at the trial, and presented it (Trans. 4) to the respondent trial Judge.

Respondent marked it "presented" and also endorsed on it that it was not a true and accurate statement of the facts in the case (Trans. 4). He then ordered that a hearing be held for the purpose of settling the contents of the report, and determining the facts to be incorporated therein, pursuant to the Illinois Practice (*People* v. *Williams,* 91 Ill. 87, 91). This hearing was held before him on October 29, 1940, and there were present observers for the Chicago Bar Association, Chicago Civil Liberties Committee and the National Lawyers' Guild (Trans. 73). A stenographic transcript of this hearing appears in the record (Trans. 73-127).

Petitioner testified in his own behalf, and called as witnesses two bystanders. All were extensively cross-examined, but their testimony as to what happened at the "trial", which was in substantial accord with the report of proceedings, was not shaken (Trans. 74-86, 106-118). The City of Chicago, the prosecuting agency, called a police officer who had not witnessed the "disorderly con-

duct" (Trans. 96), but who had been present in court at the "trial", and who testified that the respondent had been "arraigned"; but who, even on direct examination stated that: "What was said, and what transpired, I have no recollection now, I can't recall" (Trans. 98-106). One of the arresting officers was called, who had not been present at the "trial" (Trans. 89-96).

*Assistant State's Attorney Buchman, who had been present at the trial, and who offered to testify* (Trans. 68) *did not testify; nor did the court bailiff or court clerk, who had been present at the original trial, testify.* Testimony in support of the report of proceedings tendered by this petitioner to the trial Judge is therefore uncontradicted, even by any assertion by respondent that his recollection was to the contrary; in other words, there is not a scintilla of evidence in contradiction of this petitioner's report of proceedings. Nevertheless, at the conclusion of the hearing, the trial judge refused either to point out any inaccuracies or to sign the report (Trans. 125-126).

*The respondent has never pointed out any inaccuracies or insufficiencies in the report of proceedings which this petitioner submitted to him, nor has he at any time, at any of the hearings or elsewhere, ever asserted that he had any recollection of what had happened at the petitioner's "trial".*

**The Mandamus Proceedings in the Illinois Supreme Court.**

Under Illinois law a trial Judge who refuses to sign a report of proceedings may be coerced by mandamus. *People* v. *Green, Judge,* 318 Ill. 421. Accordingly, this petitioner filed a petition for mandamus against Judge Donoghue in the Illinois Supreme Court (Trans. 10-17). Judge Donoghue appeared by counsel, and filed a motion to dismiss the mandamus proceedings on the ground,

among others, that the petition was insufficient (Trans. 24, 25-26). The Judge also filed an alternative motion, that in the event his motion to dismiss be denied, he have 20 days within which to file an answer.

This petitioner then filed suggestions that the pleadings be closed on the petition for mandamus and motion to dismiss, on the authority of *People ex rel. Weber v. Wells, Municipal Judge, etc.*, 255 Ill. 450, (in which the Illinois Supreme Court had held, in a mandamus suit against a judge, that "the defendant will not be allowed to reply matter of fact to the petition after submitting the case on issues of law"), and asked for a denial of the motion to dismiss and for a writ of mandamus to issue (Trans. 29-36, 31). But the Court, while it denied respondent's motion to dismiss, did not close the pleadings, and did not issue a writ of mandamus, but allowed respondent to answer over, thus in effect refusing to follow its decision cited *supra*, in *People ex rel. Weber* v. *Wells*, etc., 255 Ill. 450.

The respondent thereupon filed an answer, in which he denied that the report of proceedings which had been tendered to him by the petitioner had been true and correct; and he averred that he had prepared a true, correct and complete record of the proceedings, and had signed, sealed and certified the same, and had filed it with the Clerk of the Municipal Court on March 7, 1941 (more than six months after the "trial"). A copy of such report was attached to the answer (Trans. 40-43, 44-46). This report was not based on anything other than the *ipse dixit* of the trial Judge (See Trans. 42).

Examination of Judge Donoghue's version of the trial (Trans. 45-46), including particularly the references to the testimony of Thomas F. McNulty, shows that it differs

materially from the testimony of McNulty himself as given on the hearing to settle the report of proceedings (Trans. 97-106; particularly Trans. 99 and 100).

The judge's report of proceedings also set forth that this petitioner had been sworn and had testified against himself (Trans. 45-46), *which had not been stated, or testified to, by any person at the hearing to settle the report of proceedings, and had been expressly denied.*

Petitioner thereupon filed a motion to strike respondent's answer for insufficiency (Trans. 50-52); and, in the same document, filed an alternative reply (Trans. 52-127), to be considered in the event the motion to strike should be overruled. The alternative reply took issue with the allegations of respondent's answer and set up the proceedings which had been had at the hearings to settle the report of proceedings, including a complete stenographic transcript (Trans. 64-127).

The Supreme Court then entered an order *sua sponte,* closing the case upon the petitioner's motion to strike and refusing to consider the alternative reply (Trans. 128).

*This petitioner was thus denied the right to make an issue of fact, which right had been afforded to the respondent.* Petitioner thereupon filed a motion to vacate the order closing the issues, and refusing to consider his reply (Trans. 136-141). In this motion he pointed out that the right to plead over after motion to strike overruled, had been given to respondent, in spite of the decision in *People* v. *Wells,* 255 Ill. 450, which had been called then to the court's attention; that petitioner was thereby given to understand and did understand that the holding in *People* v. *Wells,* 255 Ill. 450, had been overruled; that petitioner was interested in obtaining a hearing on the merits; and petitioner offered to abandon his motion to strike (Trans. 139-140) and asked that the

Court consider his reply, and that the case be heard upon the merits. *Petitioner pointed out that the action of the Court, in giving respondent an opportunity to plead over after motion to strike overruled, while in the same case denying the same right to petitioner, would be a denial of the equal protection of the laws to petitioner, contrary to the 14th Amendment to the United States Constitution* (Trans. 139).

This motion by petitioner was overruled, and the case was decided on June 17, 1941, by a dismissal of the petition for mandamus.

**The Opinion of the Illinois Supreme Court.**

The opinion of the Illinois Supreme Court does not mention this petitioner's motion to vacate the order closing the case on the pleadings, nor does it pass upon the question of equal protection of the laws therein raised.

The language in the opinion, which might have been limited merely to the question of what judgment ought to be rendered on the pleadings, went, however, much farther. The court held that the only protection which a litigant has against a false report of proceedings is the trial Judge's oath of office and that his determination of the contents of the report of proceedings is utterly binding and conclusive and not subject to any revisory action, even though a hearing has been had (and, by implication, regardless of whether there was a scintilla of evidence or statement at a hearing held to settle a report of proceedings to support a version different from the one advanced by the litigant).

**JURISDICTION.**

This petitioner asserted in the Illinois Supreme Court (which was the court of original jurisdiction in the mandamus proceeding), and asserts here, that the procedure

in the mandamus proceeding operated to deprive him of rights preserved to him by the equal protection (Trans. 130, Brief p. 5, 139) and due process (Trans. 130, Brief p. 5) clauses of the Fourteenth Amendment. The questions are substantial, since the holding of the court below will in effect compel petitioner to have his appeal from the judgment of conviction determined upon a false statement of facts. The questions were raised at the first possible time: the equal protection question was raised when the court *sua sponte* closed the pleadings, by a motion to vacate (Trans. 139) which was denied; and also in the first brief filed (Trans. 130, Brief p. 5); while the due process question was also raised in the brief in anticipation of a holding that the trial Judge's power over the content of a report of proceedings might be absolute and arbitrary (Trans. 130, Brief pp. 5, 9).

## THE QUESTIONS PRESENTED.

1. *Equal protection of the laws.* When the court permitted respondent to plead over after his motion to dismiss was overruled, and after petitioner had asked that the pleadings be closed, citing *People* v. *Wells,* 255 Ill. 450, its action was to all intents an overruling of *People* v. *Wells,* which petitioner rightfully supposed the court would adhere to in passing on subsequent pleadings. When it then *sua sponte* closed the issues on petitioner's motion to strike, and declined to consider his alternative reply, this was to all intents a reaffirmance of *People* v. *Wells,* without warning or explanation, to this petitioner's prejudice. Did its refusal thereafter to permit petitioner to abandon his motion to strike, before it had been passed upon, so that he might equally with respondent have his reply considered by the court, and the case disposed of on the merits rather than on the sufficiency of the pleadings, constitute a denial of equal protection of the laws?

2. *Due process of law.* Was the Illinois Supreme Court correct in its holding (which it will presumably follow if this cause is reversed and remanded on the first question) that a trial Judge is the absolute arbiter of the contents of a report of proceedings, and that *in no circumstances* (which presumably would cover the circumstances of this case as disclosed by petitioner's reply) may he be coerced to sign a report of proceedings except in a form agreeable to him; so that a litigant is required to have his rights determined on review by such findings of fact as it may please the trial Judge to certify no matter how conclusive the evidence that such findings are false and spurious? Or is that holding a denial of the due process of law?

## REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

1. The effect of the decision is to compel this petitioner to prosecute his appeal (which may come ultimately to this Court) from the judgment convicting him, upon a false record and thus to deny him constitutional liberties through spurious findings of fact by the state court. This Court has held that it will afford a remedy in such a case. *Milkwagon Drivers' Union* v. *Meadowmoor Dairy,* 61 S. Ct. 551, 557.

2. Insofar as the decision of the Illinois Supreme Court may be construed to hold that petitioner was required to have the cause determined on the pleadings consisting of the petition for mandamus, answer of respondent, and petitioner's motion to strike that answer, and that petitioner could not have his alternative reply considered, this petitioner was thereby deprived of the equal protection of the laws: because while the respondent was permitted to plead over after motion to strike overruled, the same right was not afforded to the petitioner. This

is contrary to the doctrine of *Truax* v. *Corrigan*, 257 U. S. 312, and also to a line of Illinois cases of which *Hecker* v. *Illinois Central R. R. Co.*, 231 Ill. 574, is an example. This doctrine is particularly applicable in the instant case, since the Illinois Supreme Court, by permitting the respondent to plead over after *People* v. *Wells*, 255 Ill. 450, had been called to their attention, had in effect overruled *People* v. *Wells* and had thereby led petitioner to believe that he, as well as respondent, could move to strike and retain the right to plead over in the event of an adverse decision.

3. This is the only case ever decided, so far as we have been able to find, in which the doctrine that the trial Judge has absolute power over the content of the report of proceedings, and that the litigant has no remedy against a spurious report, has been squarely asserted. In at least two cases there are *dicta contra* (*State* v. *Huffaker*, 7 Tenn. Civ. App. 1, 7-9); and *State* v. *Cooper*, 64 S. W. 750, 107 Tenn. 202). We submit that the advancement of so pernicious a doctrine ought to be examined and overruled by this court. *This is a case in which not a scintilla of evidence, or indeed of statement, sustains the version contained in the report certified by the trial Judge.* It is on its face a spurious, false, arbitrary, and oppressive act—indeed, the culmination of a series of arbitrary and oppressive acts—by the trial Judge. If this doctrine be sustained, then the trial Judge will be the only individual acting as an agency of government from whose acts, however arbitrary, unreasonable and oppressive, the person is not protected by the due process clause. (See the briefs of petitioner filed in the Illinois Supreme Court (Trans. 130, pp. 5, 7-10, and Trans. 134, p. 7).

4. The doctrine that the trial Judge is infallible in settling the report of proceedings (*i. e.*, that the ultimate truth, for purposes of review, is that which the trial Judge

is willing to certify, rather than that which actually happened) is neither fundamental nor sacrosanct. In many states the legislature has afforded a solution to the problem here presented, by enacting statutes authorizing (a) the report of proceedings to be made up by bystanders (4 *C. J. S.* 1334, citing cases from seven states), or (b) the contents of the bill to be determined by the reviewing court (4 *C. J. S.* 1337, citing cases from seven other states).

But Illinois has no such statute. If *certiorari* be denied in this case, there will be, in view of the broad language used by the court below, a doubly unfortunate result: (1) Wilful or corrupt judges will be reassured that they are subject to no corrective process, and (2) Litigants prejudiced by spurious findings of fact will be lead to believe they have no remedy.

## RELIEF SOUGHT TO BE OBTAINED IN THIS COURT.

We ask that this court issue *certiorari*, and upon hearing, reverse and remand this case, with directions to the Illinois Supreme Court to proceed in the case upon the petition for mandamus, the answer of respondent, the reply of this petitioner, and such other pleadings as may be filed in the case until issues are made up; and, if this court deems it appropriate so to do, to overrule the holding of the Illinois Supreme Court which clearly implies that no power exists, where the trial Judge's report of proceedings or other finding of facts is clearly shown to be spurious, to compel him to certify a true and accurate one as shown by uncontradicted evidence.

Respectfully submitted.

CHARLES LIEBMAN,
PEARL M. HART,
*Attorneys for Petitioner.*

(19)

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*Respondent.*

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**PETITION TO PROCEED ON A TYPEWRITTEN RECORD.**

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CHARLES LIEBMAN,
PEARL M. HART,
29 South LaSalle Street,
Chicago, Illinois,
*Attorneys for Petitioner.*

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**PETITION TO PROCEED ON A TYPEWRITTEN RECORD.**

---

This petitioner for certiorari now petitions the Court that this cause may proceed herein upon a typewritten record. In support of this petition he makes the following averments:

1. Petitioner Charles Simus was born in the city of Stuttgart, Germany, in 1897, and arrived in the United States in 1917. He has lived in this country continuously since that time and is a citizen of the United States.

2. Petitioner is a baker by trade, earning, when employed, approximately $32.00 per week. Petitioner is married and resides in the City of Chicago with his wife and two children, aged 13 and 16 years old respectively, who go to school.

3. Petitioner has not more than $50 cash. His only property consists of clothes and household furniture; and a $1,000 equity, which represents his life's savings, in a two-apartment building which is subject to a $6,500 first mortgage.

4. Petitioner has always been a law-abiding citizen, and the only time petitioner has ever been arrested, was the time when he sustained the treatment which resulted ultimately in this case being brought to this Court.

5. The experience which Petitioner underwent after that arrest shocked and horrified him. He had not realized that such things could happen in America. He made inquiries to various persons as to whether or not anything could be done not only to help him, but to prevent other persons from undergoing similar indignities and injustices and was directed to the Chicago Civil Liberties Committee, which agreed to furnish him with an attorney without charge.

6. This petitioner was not only compelled to pay $60.00 as fine and costs to keep from going to prison, but was compelled to pay $10.00 additional extorted by court attaches. He has likewise become obligated to pay costs of the appeal to the Illinois Supreme Court, and costs of the mandamus proceedings in the Illinois Supreme Court,

and the costs in this court, and also stenographer's and printer's charges. A number of persons whose interest has been enlisted, have agreed to contribute small amounts to the expense of this case, but the main burden still falls on this petitioner.

7. The Clerk of this Court has requested petitioner to deposit $355 to secure the cost of printing the record. It is impossible for this petitioner to furnish or obtain enough money to print the record in this case. Unless this Court will proceed on the typewritten record, petitioner will be compelled to abandon this petition for certiorari. But this petition for certiorari ought to be considered by the Court, not primarily for the good that will be done thereby to the petitioner if he should prevail, but because the form of procedure in use in the Illinois Courts, as disclosed by the record here, prevents persons from having their day in court; and, if they are denied their day in court, from obtaining any relief on appeal.

8. Your petitioner is not a pauper, but he is unable to pay the costs of the proceeding. For him to do so would create unbearable hardship for his wife and children. The record in this case, this petitioner is advised and believes, is simple enough so that no undue hardship would be caused to this Court if it were to consider this case upon the typewritten record.

9. Your petitioner therefore respectfully prays that this Court may permit this case to be considered and heard upon the typewritten record herein, and that printing of the record be dispensed with.

.....

CHARLES SIMUS,

State of Illinois,
County of Cook—ss.

CHARLES SIMUS, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and that the same is true.

.....

CHARLES SIMUS.

Subscribed and sworn to before me, a notary public, in and for the County of Cook and State of Illinois, this 25th day of September, 1941.

.....

Notary Public.